JD(NY)-51-05
Clifton, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

JANITORIAL ENVIRONMENTAL SERVICES CO., INC.,
SUCCESSOR TO A&A MAINTENANCE

and Case No. 22-CA-26839

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ

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Counsel for Respondent

DECISION

Statement of the Case

MINDY E. LANDOW, Administrative Law Judge. This case was tried before me on September 13, 2005 in Newark, New Jersey.

Pursuant to a charge and an amended charge filed by Service Employees International Union, Local 32B-J (Local 32BJ or the Union), the Regional Director for Region 22 issued a complaint and notice of hearing on June 27, 2005[1] alleging that Janitorial Environmental Services Co, Inc. (the Respondent) violated Section 8(a)(1) and (3) of the Act by refusing to hire eight named employees. The complaint additionally alleges that the Respondent is a successor to A&A Maintenance (A&A), the former employer of the named employees and that the Respondent has violated Sections 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union as the designated collective-bargaining representative of the employees at issue herein. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent is a corporation, with an office and place of business located in Whippany, New Jersey, which provides cleaning and janitorial services. The Respondent admits that, based upon a projection of operations, it will annually provide services valued in excess of $50,000 to Linens-n-Things, an enterprise located at 2-4-6 Brighton Road in Clifton, New Jersey, which is, in turn, an enterprise directly engaged in interstate commerce.

[1] All relevant dates herein are in December 2004 or January 2005 unless otherwise indicated.

Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Background

Linens-n-Things operates a retail facility situated in three adjacent buildings located at 2-4-6 Brighton Road in Clifton, New Jersey (the Linens facility). A&A Maintenance (A&A) was the recipient of a contract to provide commercial cleaning services to this facility, and, at some point during 2004, the Union came to represent its employees. A Rider Agreement, effective June 1, 2004, was executed setting forth specific rates of pay applicable to the A&A employees at the Linens facility.[2]

Jorge Piza is the proprietor of the Respondent, which was incorporated in 1994. Historically the Respondent has operated as a small business venture which provides janitorial and commercial painting services, with a staff consisting of Piza and two or three part-time employees. In 2004, Respondent contracted with a firm called Interiors Unlimited to provide painting services to the Linens facility involved herein.

Sometime in about November 2004, Piza had a discussion with Linens property manager Al Pearl about assuming the janitorial services contract at the facility. In about mid-December, Piza learned that that he was going to be awarded the contract, commencing January 2005. The business arrangement was eventually memorialized in a contract which was signed by Piza on January 3, 2005, the first day of operations.[3] According to Piza's testimony, he had prepared bid proposals as well as earlier drafts of the contract which were submitted to Linens, but he was unable to produce these at the hearing.[4]

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[2] Also in evidence is a 2005 New Jersey Contractors Agreement (the Contractors Agreement) which provides, in relevant part:

> This agreement shall apply to all service employees employed in any facility in the State of New Jersey (north of Route 195) excluding commercial office buildings under 100,000 square feet, except that economic terms and conditions for . . . department stores. . . shall be set forth in riders negotiated for each location covered by this agreement.

According to the Rider Agreement, as of June 2004, all employees were to receive a minimum salary of $7.00 per hour or a wage increase in the amount of $1.00 per hour for part-time and $0.50 per hour for full-time employees, whichever is greater. Union delegate Arlety Manzueta did not testify that the terms of the Contractor's Agreement were applied to the A&A employees. Moreover, employee Lauro Enriquez testified that after he joined the Union he received a $0.50 cent pay raise but that his benefits did not change. I conclude, therefore, that the terms and conditions of employment contained in the Contractors Agreement were not, in fact, applied to the incumbent employees.

[3] The contract is not executed by Linens-n-Things, but a written addendum relating to renewal of the contract appears to have been initialed by a representative of the company. There is no evidence that the agreement is not being followed.

[4] Also in evidence is a letter, dated January 1, from Piza to Pearl thanking him for being allowed the opportunity to present his proposal for janitorial services.

Piza testified that, based upon the square footage of the property and the number of buildings involved, he decided to staff the buildings with ten employees who would provide cleaning services five evenings per week, along with one supervisor and another employee designated to provide daytime maintenance services for 30 hours per week over five days.[5] He set the hourly wages for employees at $6.50, $8.00 and $12.00 for porters/matrons, the night supervisor and the day porter respectively. Piza acknowledged that he was aware that the incumbent employees belonged to the Union.

Piza had never run an operation of similar size. With just two weeks to hire employees prior to the January 3 start date, Piza sought to obtain employees by posting signs in local restaurants and calling friends and relatives for references. On cross-examination, Piza acknowledged that that he had not met a number of his employees prior to the commencement of operations on January 3. In addition, there is no evidence as to whether any of these new employees had experience working in a commercial cleaning setting, or whether Piza even inquired about their prior work experience prior to hiring them.

Piza also had discussions with four incumbent employees, whom he knew from his work at the Linens site. Among these was supervisor Lauro Enriquez (Lauro), who apparently was treated as a member of the bargaining unit, and who testified at the hearing. Piza told Lauro that he had been awarded the cleaning contract and was planning to book his staff and might be offering him a job. Lauro replied that, in addition to performing his supervisory duties, he was also cleaning one of the floors assigned to his wife, and collecting her paycheck for doing so. Piza testified that he decided not to hire Lauro under these circumstances, although it does not appear from his testimony that he communicated this decision at the time. Lauro's account of their discussion is at variance with Piza's. Lauro testified that he learned that A&A no longer had the cleaning contract during a discussion with Piza, who initially stated that he was going to try to "contract him." Lauro then asked Piza to give work to the others and Piza replied that he could not, because the people that had hired him did not want anyone related to the union. According to Lauro, this discussion took place on December 29. Lauro then contacted his supervisor, Juan Carlos Ocampo, and was told to report to work as usual on the next work day, and that perhaps he would be hired. He also called Union delegate Arlety Manzueta, who said that they would all go to the facility to seek work from the new contractor.

Piza also spoke with Salvador Granados, stating that he been given the cleaning contract and had noticed that Granados was a good performer and that he was probably interested in hiring him. According to Piza, Granados mentioned that the cleaning employees were in the Union and Piza responded that he was going to be a non-union contractor. Granados responded that he was paying union dues without receiving any raise and could care less if the facility was unionized. Granados expressed interest in the position, and Piza provided him with an employment application. Granados apparently completed the application, which is dated December 29. The record establishes that Granados was among a group of employees who came to the facility on January 3, but was not hired at that time. According to Piza, he subsequently returned to the facility seeking employment and was hired at the end of the month.[6]

[5] This appears to be consistent with the A&A staffing pattern. Although Union delegate Arlety Manzueta testified that there were approximately eight employees assigned to the site, evening supervisor Lauro Enriquez testified that he supervised ten employees. A&A had a day porter assigned to the site, as well.

[6] Granados, who is one of the eight employees named in the complaint, did not testify.

According to Piza, at about this time he also spoke with employee Henry Mosia, telling him that he was a non-union contractor and that if Mosia was interested in a position, he would be happy to take him on. Mosia did not apply initially, but later returned to the facility and was hired some months later. In addition, Linens had asked Piza to retain day porter Andre Villa, and Piza accordingly offered him the opportunity to stay on. Villa stated that he would leave if he did not receive a raise. Piza then consulted with Linens and, after doing so, offered Villa $12.00 per hour. Piza did not offer employment to any other of the incumbent employees and testified that he "wasn't interested in all the crew."

Union delegate Manzueta testified that in December 2004, she received a telephone call from employee Lauro Enriquez, [7] who advised her that he heard that Linens was bringing in another cleaning contractor. Manzueta reported this information to her superiors and, along with lead delegate Kathy Thomas, met with Pearl, and inquired as to who was assuming the contract. Pearl replied that he was not authorized to provide that information, and suggested that the Union representatives contact his supervisor, Toni Bartaman.[8] Manzueta did not make an attempt to contact Bartaman and she was uncertain as to whether Thomas was successful in doing so.[9] Manzueta was instructed to go to the facility and request employment applications for the A&A employees. She communicated with the employees in question and it was agreed that they would meet at the Linens facility on the first working day after the A&A contract was up and request applications from the new cleaning contractor.

The commencement of operations on January 3

On the evening of January 3, Piza was at the facility, together with a newly-hired staff, family members and another employee who typically performed painting services for him. Piza testified that he was very busy and a "nervous wreck," as he was unused to such a large operation. When employees reported for work that first evening, they were provided with employment application forms to complete. In a number of these applications, which are in evidence, a substantial amount of the information called for was not furnished.[10] As discussed in further detail below, during the course of the evening, two additional employees were hired but did not remain to finish their shifts.

During the evening, as Piza was traveling between buildings, Manzueta approached him, identified herself as the Union representative asked Piza to hire the A&A employees. Piza testified that he told Manzueta that he was a non-union contractor and was fully staffed. Manzueta requested employment applications, and Piza went inside, obtained one application and brought it to Manzueta, who stated that she would make copies for the employees. At some point during their exchange, Piza handed Manzueta his business card.

Manzueta testified that on that evening she, accompanied by eight employees, went to the Linens facility. Upon their arrival she asked to see the supervisor. Subsequently, Piza stepped outside, and offered Manzueta his business card. Manzueta introduced herself along with the employees and requested employment applications. Piza stated that he couldn't hire

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[7] The transcript states "Lauro Rodriguez." This is an obvious error and I correct it.

[8] There is no direct evidence to establish that Piza sought to conceal the fact that he was hiring employees.

[9] Thomas did not testify.

[10] In particular, a number of employees failed to designate whether they were citizens of the United States or legally allowed to work in the United States, and a significant number failed to note any prior work experience or employment references.

union employees. After Manzueta insisted on receiving applications, Piza provided one and told Manzueta that she could make copies and have the employees submit the applications to the listed address. According to Manzueta, Piza stated at the time that he would have liked to hire the former employees but the building manager had instructed him not to hire union workers.

Immediately after this discussion Manzueta wrote a statement, in Spanish, which was signed by the employees present. As translated at the hearing, it states as follows:

> Today, third of January 2005, the persons affirm under the witnesses, and I Arlety Manzueta, delegate from 32-BJ, we went to the building 2,4,6 Brighton Road, Clifton and requested applications for work to Mr. Jorge Piza of JESC, Inc. We all heard when Mr. Piza said that he cannot give work because all the workers present belong to the union and the building had instituted not to contract no one belonging to the union. Mr. Piza repeated again that the building didn't want the union. That's what he had contracted me. Mr. Piza indicated that he had all the intentions to contract the prior employees, but that the management from the building had prohibited. All the persons that signed were working at 2,4,6 Brighton Road and affirm that on their word this testimony is true.
>
> (signed) Daniel Enriquez
> Bettzaira Rodriguez
> Roberto Enriquez
> Midalia Enriquez
> Rodolfo Gonzalez
> Lauro Enriquez
> Salvador Granados
> Daisy Martinez

According to Lauro, when the employees went to the facility on January 3, Piza offered employees three applications and said that in the future he could call one of the employees for work. Piza added that "the reason they didn't want the people there, it was because they were from the union." Lauro was present when Manzueta drafted the statement discussed above, and he read it and signed it.

Daniel Enriquez (Daniel) is Lauro's brother and worked for A&A as a cleaner. Lauro told him that A&A had lost the contract, but that he had been offered work. Daniel was one of the employees who accompanied Manzueta on the evening of January 3. Daniel did not participate in the discussion with Piza, but stated that he overheard it, and heard Piza state that he was not authorized to hire people that are related to the union. He also signed the statement written by Manzueta.

Midalia Enriquez (Midalia), who was also present that evening, testified that she heard Piza state that he was going to give the employees applications but he was not sure if he could contract them because they were with the union. She also signed the document composed by Manzueta on that occasion. She further testified that during the time she was at the Linens facility, she observed employees arriving for work and working inside the building.

In response to leading questions from counsel, Piza denied that anyone from Linens-n-Things had instructed him not to hire Union employees, that he ever made a statement to such effect or that he ever said that he would not hire anyone who was a Union member. Other than

Granados, none of the employees present on that evening subsequently submitted an application for employment or otherwise requested to be hired.[11]

Respondent's operations as of January 3 and thereafter:

Piza testified that as of the time operations commenced, he had hired a full complement of ten employees along with supervisor Rodrigo Azofeifa and day porter Villa. Two employees, Maria Eunice Garcia and Yohana Motta, were hired by Piza's wife the first evening of operations but did not remain to finish their shifts. According to Piza, they might have stayed "only seconds" but this was not known until later that evening, and Piza had to remain behind to complete their assigned work. Their replacements, Juan Pablo Uribe and Desiree Lizano, and were hired on Wednesday and Thursday of that week, respectively. In succeeding weeks, Piza hired replacements for employees who left the job. As he testified, there is a fair amount of turnover in the industry and, as of the time of the hearing, only three employees out of the original crew were still employed. Piza testified that he kept a few employment applications on file, as well as a log of people calling in.[12]

III. Analysis

The complaint alleges that the Respondent unlawfully refused to hire the former employees of A&A Maintenance when it took over the cleaning operations at the Linens facility; that it is a successor to A&A and that it has unlawfully failed and refused to recognize and bargain with the Union.

A new owner of an enterprise is not obliged to hire the employees of its predecessor, but may not refuse to do so because they were represented by a union or to avoid a bargaining obligation with a union. In *FES*, 331 NLRB 9, 12 (2000), enf'd 301 F.3d 83 (3d Cir. 2002), the Board announced the evidentiary requirements and respective burdens of proof applicable to allegations of an unlawful refusal to hire:

> To establish a discriminatory refusal to hire, the General Counsel General Counsel must . . . first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. (Footnotes omitted.)

Once this is established, the burden will shift to the respondent under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to show that it would not have hired the applicants even in the absence of their union activity or affiliation. Id. Further, the Board made clear that the General Counsel must show at the hearing

[11] As noted above, Mosia later applied for work and was hired, but he was not present on that evening. Manzueta testified that it was possible that not all the incumbent employees were present on this occasion.

[12] Respondent offered into evidence payroll records from the first three weeks of operations.

on the merits of the case that there were available openings for the applicants. Id at 14.

The evidence establishes that for a period of time commencing in about mid-December up to and including the first evening of operations on January 3, and at various times thereafter, the Respondent was hiring or had concrete plans to hire employees. The evidence further establishes that the incumbent A&A employees who had worked at the site had performed the same sort of work, in the same facility, using the same sorts of materials and therefore had the requisite training and experience relevant to the positions being filled.

Moreover, I find that the General Counsel has established that the Respondent's actions were motivated, at least in part, by discriminatory considerations. With only two weeks to hire a staff, Respondent chose not to solicit employees from a ready-made work force. It is obvious that Respondent could have easily distributed employment applications to the crew (as he did with Granados) and interviewed prospective applicants on site. Rather than doing so, Respondent hired employees from a largely unproven labor pool, including individuals he had never personally met. Moreover, there is no evidence that Piza sought information regarding prior work experience or whether the employees were even legally authorized to work in the United States. The Union-represented workers were not notified until just before Respondent took over the contract that their services were to be terminated. By the time they appeared at the facility on January 3 and sought jobs, their positions had been filled. I find that this conduct strongly supports an inference that the Respondent had a discriminatory motive relating to its hiring decisions. *E.S. Sutton Realty Co*., 336 NLRB 405, 408 (2001); *Systems Management*, 292 NLRB 1075 (1989); *Shortway Suburban Lines*, 286 NLRB 323, 325-6 (1987).

I need not rely solely upon such an inference, however. Piza's own testimony establishes that the incumbent employees' Union affiliation was a factor in the Respondent's hiring decisions. He admitted informing employees Granados and Mosia, and stating to Manzueta, that his company was non-union. This is a demonstration of Respondent's intent to operate as a non-union shop and provides direct evidence of a discriminatory motive. See e.g. *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 80 (1979) (respondent's conceded intention not to allow employees to be unionized itself supports a conclusion of illegal motive).

I additionally credit Manzueta's testimony that Piza stated that he would have liked to hire the former employees, but the building manager had instructed him not to do so. The employees who testified generally corroborated this testimony in that they recalled, in effect, that Piza stated that he could not hire Union employees. Further, this account is corroborated by Manzueta's contemporaneous written statement. Moreover, I find that it is inherently plausible that, in the midst of a busy first evening of operations, upon being confronted by a Union representative and a group of employees seeking work, Piza would make such a comment, seeking to deflect the responsibility for the hiring decisions from himself, in an attempt to diffuse the situation. In finding that Piza made this statement to employees, I draw no conclusion about whether what he said was, in fact, truthful. I do find, however, that it constitutes evidence of an unwillingness to hire Union-represented employees. Moreover, I conclude that the totality of Piza's conduct, including his apparent reluctance to distribute employment applications to the entire group, is further proof that he did not want to hire a majority of Union-represented employees.[13]

[13] In contrast, I do not credit Lauro's account of his December 29 discussion with Piza, in particular, that aspect of his testimony concerning Piza's statement that he could not hire Union employees. I note that Lauro spoke with both Manzueta and his brother, Daniel, after this encounter took place. If Piza had made such a comment, it is more likely than not that this

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Thus, I find that, under *FES*, the General Counsel has established a prima facie case that the Respondent has unlawfully refused to hire the named employees due to their Union membership or affiliation. Accordingly, the burden now shifts to the Respondent to establish that it would not have hired the employees even in the absence of their union activity or affiliation. *FES*, supra at 12.

Respondent advances several arguments by way of defense. As an initial matter, Respondent argues that I should credit Piza's testimony that he was never told by any Linens representative that he was not allowed to hire Union employees from A&A or elsewhere, that he was told that he would be denied the contract should he do so, or that he ever made any such comment to the Union or employees. The Respondent further argues that, as of the commencement of operations on January 3, the Respondent was fully staffed with employees who had been hired prior to that evening. Further, the Respondent points to the fact that it hired three former A&A employees: Granados, Mosia and Villa, with the full knowledge that they were represented by the Union while working at A&A. Moreover, Respondent argues that, with the exception of Granados, the employees listed in the Complaint never submitted applications for employment. Finally, it is contended that Lauro was rejected from consideration due to his "deceitful behavior with A&A."

Much of Piza's testimony, especially regarding his assumption of the cleaning contract, and the process by which he hired employees, was vague and equivocal. I do not give weight to his rote denials, issued in response to a series of leading questions, regarding whether or not he was told not to hire Union-represented employees or whether he ever told anyone he could not do so. Notwithstanding these general impressions, I do, however, credit Piza's testimony with regard to certain events, for the reasons discussed below.

Respondent argues that it was fully staffed as of the commencement of operations. Under the circumstances of the case, this contention misses the point.[14] The evidence is clear that Respondent excluded a majority of the incumbent employees from consideration for employment during the period when they could have been hired.[15] When they came to the facility seeking jobs, they were told that none were available.[16] During cross-examination, Piza

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would have been something that Lauro would have reported to others, in particular to his Union delegate. Manzueta, however, made no reference in her testimony to any such report by Lauro, and Daniel testified only that his brother reported that Piza had offered work to him. I further note that Lauro did not offer testimony to rebut Piza's account of their discussion.

[14] The complaint alleges that the failure to hire took place on January 5. In concluding that the relevant period includes the two week period immediately preceding up to and including the date operations commenced, I note that Section 102.15 of the Board's Rules and Regulations requires only that a complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." In the instant case, the Respondent was given a full opportunity to provide, and in fact did provide, testimony regarding his activities during this period, his hiring process and his interviews with incumbent employees. Respondent relies upon his activities during this time frame in defense to the allegations of complaint. In particular, as discussed below, I have credited Piza's testimony regarding why he did not hire Lauro during this period.

[15] Although the complaint does not specifically allege that the Respondent failed to consider employees for hire, Respondent's course of conduct demonstrates, as an evidentiary matter, that he excluded Union-represented employees from the hiring process.

[16] In fact, the evidence establishes that Respondent had job openings and concrete plans to

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acknowledged that he could have distributed employment applications to incumbent employees, but maintained that he was not interested in the entire crew. He advanced no reason nor offered any evidence as to why that was the case. In this regard, Respondent points to that the fact that it employed three incumbent employees, and gave due consideration to Lauro. Such evidence, however, is insufficient to rebut a finding that the Respondent's hiring decisions were motivated, at least in part, by unlawful considerations, and, more importantly, does not shed any light on why others were not hired. As regards the three incumbent employees that were employed, the record establishes that the offer of employment to Villa was a direct result of a request from Linens. Piza's discussions with Lauro and Granados occurred in the last days before the Respondent was due to commence operations.[17] The record establishes that Piza had not filled his employee roster at that time, as he had at least two openings as of January 3. Thus, the evidence suggests that when Piza spoke with Lauro and Granados about coming to work for him it was due to the fact that he was about to take over the contract and had a staff shortage in the face of an upcoming holiday weekend. Further, Granados was not hired on January 3, notwithstanding his prior discussion with Piza, and both he and Mosia were only hired later, when the Union was no longer on the scene. Moreover, it is well-settled that the fact that certain union affiliated applicants are hired does not, in and of itself, rebut evidence of unlawful motivation. See e.g. *H.B. Zachry Co*., 332 NLRB 1178, 1183 (2000) ("an employer's failure to discriminate against all applicants in a specific category is not decisive in cases involving refusal-to-hire allegations.")

Further, the evidence also shows that the Respondent has continued to hire employees to fill vacancies since January 3. As noted above, the Respondent argues that the named employees never filed applications for employment. The General Counsel contends that the Respondent had an obligation to fill vacancies with the incumbent A&A employees, and that Piza's conduct made the submission of employment applications unnecessary. In support of this contention, Counsel for the General Counsel relies upon *Capitol Cleaning Contractors*, 322 NLRB 801 (1996), a case decided prior to *FES*, where the Board found that the respondent therein violated Section 8(a)(1), (3) and (5) of the Act, notwithstanding the failure of employees therein to file employment applications. Under all the circumstances herein, I find that the failure of the incumbent employees to file formal employment applications does not mitigate the Respondent's liability for its failure to hire these employees.

As an initial matter, I find that the record establishes that the Respondent did not have a genuine requirement that employees file applications prior to being hired. No employee hired to work on January 3 had previously submitted such an application. As noted above, the applications that Respondent maintained on file were not complete and generally served to record information such as name, address, social security number but little else. Thus, I conclude that the Respondent's reliance on the A&A employees' failure to file formal applications is pretextual.

Moreover, the Board has held that "where an employer makes known to prospective employees his refusal to hire them because of their prior union affiliation, the failure to

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hire up to and including the day operations commenced. The evidence is insufficient for me to conclude, however, that as of the time the A&A employees arrived at the facility seeking work Piza either had not hired his full staff or that he knew that the two most recent hires had already walked off the job.

[17] Lauro testified that his discussion with Piza occurred on December 29 and Granados filled out his employment application on the same day. There is no evidence as to when Piza spoke with Mosia.

undertake the useless act of making formal application for work is no defense to an 8(a)(3) allegation." *Love's Barbeque Restaurant #62*, supra at 81, fn. 10 (citations omitted). As Board member Liebman has observed: "*FES* does not clearly speak to situations where a potential applicant takes no steps to apply because the employer has prevented him from doing so or has otherwise made applying futile." *Exterior Systems, Inc*. 338 NLRB 677, 681, fn.3 (2003) (concurring opinion). However, in subsequent cases arising under *FES* the Board has held that a failure to submit an application will not disqualify an individual from being included in a class of discriminatees, where the individual can show that submitting an application would have been futile. *Wild Oats Markets, Inc.*, 344 NLRB No. 86 slip op. at 3 (2005). Under the facts of the instant case, where the Respondent announced to the incumbent employees that he could not hire them because of their Union affiliation, I find that their subsequent failure to actually file such applications does not relieve the Respondent's of liability. "[W]hen it is futile for employees to file applications, an employer is barred from asserting that it lawfully failed to hire them because of the absence of applications." *Shortway Suburban Lines*, supra at 326. In reaching this determination, I am mindful that there is uncontested evidence that certain incumbent employees were hired. Nevertheless, for the reasons discussed above, I do not find this fact controlling.

With respect to the Respondent's failure to hire Lauro, as noted above, I have not credited Lauro's account of their discussion on December 29. Rather, I have credited Piza's testimony that he decided not to hire Lauro because he had been performing his supervisory duties concurrently with his wife's cleaning duties, and collecting two paychecks for doing so. In making this determination, I note that Piza's account of this discussion appeared unrehearsed and, moreover, was specific and detailed, in contrast to much of his other testimony, as outlined above. I also find it unlikely that he would have fabricated such specific testimony, which could have easily been refuted by the General Counsel. Moreover, I note that Piza's testimony in this regard was, in fact, not rebutted. As I have credited Piza's account over Lauro's, I find that the Respondent has met its burden under *Wright Line*, supra, of showing that it would not have hired Lauro in the absence of his Union activity or affiliation.[18]

As regards the other named employees, the Respondent has failed to meet its burden to show a non-discriminatory reason for its failure to hire these individuals. There is no evidence as to why Respondent ignored the convenient and practical option of interviewing the incumbent work force, choosing what amounts to an "anyone but" approach to staffing his operations. Moreover, as noted above, Respondent admits that potential employees were told that Respondent was "non-union" and I have found that Piza told employees that he could not hire them due to their Union affiliation. In the absence of any neutral, non-discriminatory reason for the failure to hire any or all of the employees in question, I cannot conclude that the Respondent has met its burden. Accordingly, I conclude that, by refusing to hire the other named employees, Respondent has violated Section 8(a)(1) and (3) of the Act, as alleged.[19]

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[18] The record is silent as to the identity of Lauro's wife, or whether she is one of the employees named in the complaint. In the event that a compliance investigation determines that she was, in fact, one of the employees named in the complaint, for the reasons discussed above, I find that Respondent has met its *Wright Line* burden of showing that she would not have been hired regardless of her Union affiliation, and the recommended conclusions of law, order and remedy as set forth herein should be modified accordingly.

[19] I have included Granados in this group notwithstanding the fact that he was later hired by the Respondent. It is apparent that the fact that he arrived with the group of Union-represented employees deterred the Respondent from employing him at that time, notwithstanding a prior offer of employment.

Moreover, it is clear that Respondent is a successor to A&A, insofar as it is providing cleaning services to the Linens facility using similar processes and supplies and similarly skilled employees. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).[20] As Respondent discriminatorily refused to hire the incumbent employees, it is presumed that substantially all of them would have been retained. *E.S Sutton Realty Co*., 336 NLRB at 408. In such circumstances, Respondent was obliged to recognize and bargain with the Union, and was not free to unilaterally establish unilateral terms and conditions of employment.[21] Accordingly, by failing to recognize and bargain with the Union, Respondent has violated Section 8(a)(1) and (5) of the Act. *Love's Barbeque*, supra; *E.S. Sutton*, supra.[22]

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following is a unit appropriate for collective bargaining within the meaning of Section 9 9(b) of the Act:

> All full- time and regular part-time cleaners employed at the Linens-n-Things facility located at 2-4-6 Brighton Road, Clifton, New Jersey, excluding all office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

4. By refusing to hire Daniel Enriquez, Roberto Enriquez, Midalia Enriquez, Bettzaira Enriquez, Rodolfo Gonzales, Salvador Granados and Daisy Martinez, because those employees had been represented by Local 32BJ, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. By refusing to recognize and bargain with the Union as the collective-bargaining representative of its employees in the Unit, Respondent has violated Section 8(a)(1) and (5) of

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[20] The Respondent denied that the unit pled in the complaint is an appropriate unit. Although this precise unit description does not appear in any document introduced into evidence by the General Counsel, the testimony makes clear that this is the unit of employees previously employed by A&A and at issue herein, and I find that it is an appropriate unit for purposes of collective bargaining.

[21] The complaint does not specifically allege that the Respondent unilaterally changed terms and conditions of employment. The Board, however, historically has ordered the rescission of unilateral changes as a feature of the remedy for a violation of Section 8(a)(5) of the Act, as a condition of restoring the status quo ante. See e.g. *Katz's Deli*, 316 NLRB 318, 334-335 (1995), and cases cited therein. In the instant case, however, Counsel for the General Counsel has failed to establish that the terms of the Contractor's Agreement were applied to the A&A employees, and Lauro's testimony is some evidence to the contrary. I conclude therefore, that the only unilateral change that has been established on this record is the change in wages insofar as the wage levels set by the Respondent are inconsistent with those set forth in the Rider Agreement. The remission of wages shall be computed as in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[22] This finding would not be altered regardless of the outcome of the compliance investigation regarding Lauro's wife.

the Act.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not otherwise violated the Act as alleged in the Complaint.

On the basis of the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

Order

The Respondent, Janitorial Environmental Services Company, Inc., its officers, agents, successors and assigns shall

1. Cease and desist from

a. Refusing to hire any employee for being a member of Service Employees International Union, Local 32BJ, or any other labor organization.

b. Refusing to meet and bargain in good faith with the Union as the exclusive collective bargaining representative of employees in the following appropriate unit:

> All full- time and regular part-time cleaners employed at the Linens-n-Things facility located at 2-4-6 Brighton Road, Clifton, New Jersey, excluding all office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

c. Unilaterally changing unit employees' terms and condition of employment.

d. In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

a. Make whole employees Daniel Enriquez, Roberto Enriquez, Midalia Enriquez, Bettzaira Enriquez, Rodolfo Gonzales, Salvador Granados and Daisy Martinez for any losses they may have suffered by reason of the discriminatory refusal to hire them.

b. Within 14 days of the date of this Order, offer the employees listed in paragraph 2(a) above instatement for the positions for which they were qualified, or if these positions are no longer available, to substantially equivalent positions, without prejudice to their seniority and any other rights and privileges previously enjoyed.

c. Within 14 days from the date of this Order, on request of the Union, rescind the

[23] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

January 2005 unilateral changes in unit employees' terms and conditions of employment.

d. On request, bargain in good faith with Service Employees International Union, Local 32BJ as the exclusive collective-bargaining representative of unit employees with respect to wages, hours and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

e. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in an electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

f. Within 14 days after service by the Region, post at its facility in Clifton, New Jersey, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 3, 2005.

g. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The allegations in the Complaint not found to be violative of the Act are dismissed.

Dated, Washington, D.C., December 6, 2005.

Mindy E. Landow
Administrative Law Judge

[24] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to hire any employees for being a member of, or supporting, Service Employees International Union, Local 32BJ, or any other labor organization.

WE WILL NOT refuse to meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All full- time and regular part-time cleaners employed at the Linens-n-Things facility located at 2-4-6 Brighton Road, Clifton, New Jersey, excluding all office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change your terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole employees Daniel Enriquez, Roberto Enriquez, Midalia Enriquez, Bettzaira Enriquez, Rodolfo Gonzales, Salvador Granados and Daisy Martinez for ay losses they may have suffered by reason of the discriminatory refusal to hire them.

WE WILL, within 14 days of the date of this order, offer instatement to Daniel Enriquez, Roberto Enriquez, Midalia Enriquez, Bettzaira Enriquez, Rodolfo Gonzales, Salvador Granados and Daisy Martinez to their former jobs, or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of this order, on request of the Union, rescind the January 2005 unilateral changes in your terms and conditions of employment.

WE WILL, upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the unit described above with respect to wages, hours and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

JANITORIAL ENVIRONMENTAL SERVICES CO., INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor, Newark, NJ 07102-3110

(973) 645-2100, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (973) 645-3784.